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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1015

TRED-AIR OF CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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215 West Seventh Street
Suite 620
Los Angeles, California 90014
Tel: (213) MAdison 7-3241
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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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TRED-AIR OF CALIFORNIA, INC.,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Tred-Air of California, Inc., a California corporation, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a decision and judgment of that Court which allows and upholds an individual officer

of a California corporation to appear in behalf of his corporation in violation of California laws governing corporations, to represent the corporation before the National Labor Relations Board and its Hearing Examiner.

In the hearing of the corporate labor relations California law forbids anyone *but an attorney at law* to appear for or on behalf of a corporation.

Any individual or officer who is not a licensed attorney and who appears or attempts to appear is guilty of a misdemeanor and his acts are deemed a nullity, and can be prosecuted and punished.[1] Nevertheless, the Ninth Circuit Court of Appeals, contrary to California law, upheld action by the National Labor Relations Board in the absence of any attorney appearing for the corporation, and therefore unrepresented.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes.

The judgment of the Court of Appeals was rendered December 6, 1972, a copy of which is attached hereto marked Exhibit "A" and made a part hereof. At the writing of this petition, no opinion has been published.

---

[1]*Karpel v. California,* 372 U.S. 703, 10 L. Ed. (2) 124; Rehearing denied 374 U.S. 818.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Title 28, Sections 1652 and 1654, U.S. Codes; Fifth Amendment, U.S. Constitution, in its due process clause; Sixth Amendment, U.S. Constitution.

THE FACTS

Tred-Air of California, Inc., was a small California corporation engaged, in Los Angeles County at Bellflower, in the business of retreading aircraft tires. It had eight or nine employees and at times less than that number. Its employees were all non-union. Its president was Odell Lopp.

On January 8, 1970 Odell Lopp hired a nephew, Thomas Lopp, to work in the shop (T. 29), although Thomas Lopp was not a certified tire repairer nor licensed by the F.A.A. with sufficient qualifications under Federal Regulations to work on big tires. (T. 143, 148)

On July 17, 1970 Thomas Lopp was laid off with a note attached to his paycheck that he was laid off for lack of work. No other person has since been employed to do his work. (T. 86-89) The company lost its main contract with Uniroyal Tire Company.

In June of 1970 Thomas Lopp started to Unionize the shop, called on a representative of the Teamsters,

and called a meeting for an election on or about June 2, 1970. Seven employees met on June 4, 1970 and filed an election with the National Labor Relations Board to become unionized.

Thereafter, the Teamsters Automotive Workers Local 495 met at different times with persons they claimed were representing the company. On one occasion the Union representative met with a man named Walker, who it appeared was a C.P.A. accountant for Tred-Air, but it did not appear that any officer or person or lawyer was authorized by the corporation to act for it, not even its non-lawyer president. *Paradise v. Nowlin* 86 Cal. App (2) 898; *Karpel v. California* 372 U.S. 703. At no time was there ever shown that the corporation itself, through its Board of Directors, had received notice, or authorized anyone to act for it.

Odell Lopp was permitted to testify that he had never fired anybody in his life; that Thomas Lopp had been laid off for lack of work and also that Thomas Lopp was not a qualified capper and that he had faced a lawsuit because of damages caused to defective tire work.

The corporation was not represented by an attorney-at-law at the hearing. California law allows only a duly licensed California lawyer to represent the corporation in any litigation. (*Mullin-Johnson Co. v. Penn Mutual Life Ins. Co.* 9 Fed. Supp 175; *Karpel v. California* 372 U.S. 703.

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From the beginning, Odell Lopp showed his inexperience and inability to represent or act on behalf of the corporation or anyone. As set out in the findings of fact by the Trial Examiner, the following took place:

> "TRIAL EXAMINER: Mr. Lopp, are you an attorney?
>
> "MR. LOPP: No.
>
> "TRIAL EXAMINER: Do you believe that you can represent the Respondent in this proceeding?
>
> "MR. LOPP: I never went into this before. I don't know if I can or not. I didn't get an attorney because I didn't think it was necessary to get one. Maybe it is.
>
> "TRIAL EXAMINER: Well. that is something you have to decide. I take it you have given some thought to the matter.
>
> "MR. LOPP: Well, as far as that goes, I don't think that an attorney could help in this case. I haven't even talked to an attorney.
>
> "TRIAL EXAMINER: Have you given any thought to whether you want to be represented by an attorney?
>
> "MR. LOPP: I wanted to get it handled today and if I had gotten it handled by an attorney, I would have gotten an attorney and I would have had to wait and I wanted to take my chances on it today.
>
> "TRIAL EXAMINER: Then, you are satisfied to go ahead?
>
> "MR. LOPP: Right." (T. 2-3)

Again, during the proceedings, the Examiner had to remind Lopp that he was not an attorney and did not understand the proceedings. (T. 101-105)

Nevertheless, the Examiner went ahead to conduct the hearing with no one in authority actually representing the corporation as an attorney.

Following the close of the hearing, counsel was retained on behalf of the corporation. A resolution of the Board of Directors was duly adopted and forwarded to the Branch Office of the National Labor Relations Board in San Francisco, containing the following:

> ". . . The respondent corporation failed to appear by counsel and only an attorney at law can represent a corporation and bind it in California. *Pacific Employers' Insurance Co. v. Carpenter,* 10 C.A. 2d 595; see other cases cited in brief.
>
> ". . . It is respectfully requested that the denial of counsel for the corporation to appear was a denial of Due Process of law and the Equal Protection of the law also, rights guaranteed by both the Fifth and Sixth Amendments of the U.S. Constitution, and that all the proceedings be set aside and the case sent back for complete new hearing with representation by counsel for the corporation.
>
> "I enclose herewith also a corporate resolution appointing me as counsel for Tred-Air of California, Inc."

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The request was denied and the Trial Examiner's decision followed.

Tred-Air duly filed its exceptions to the Trial Examiner's decision and recommended order and brief in support thereof. On October 21, 1971 the National Labor Relations Board adopted the recommended order of the Trial Examiner and ordered Tred-Air of California, Inc., its officers, agents, successors, and assigns, to take the action set forth in said recommended order of the Trial Examiner. A copy of the National Labor Relations Board's order of October 12, 1971, incorporating the recommended order of the Trial Examiner, it attached hereto as Appendix A and made a part hereof by reference.

On November 18, 1971, Tred-Air of California, Inc. filed a petition for review of the order of the National Labor Relations Board with the Honorable Court of Appeal for the 9th Circuit of the United States. That court affirmed the National Labor Relations Board decision and ignored California Law as governing Corporate Rights.

The trial examiner also had ignored the laws of the State of California and the Constitution of the United States in arriving at his decision. He held, contrary to Title 28, Section 1652, U. S. Codes, that National Labor Relations Board Action is governed by Federal Law, not California Law. (Opinion, p. 3) Title 28, Section 1652 is Federal Law.

The laws of the State of California hold that a corporation is a separate entity from its stockholders or officers, and that only a licensed attorney can represent it.

The National Labor Relations Board was notified that the law of California did not permit anyone but an attorney to represent the corporation. This request was ignored.

QUESTIONS PRESENTED BY THIS PETITION

1. Whether the laws of the State of California governing corporations and the exclusive right to have only an attorney at law duly licensed by the state to represent a corporation govern the National Labor Relations Board in respect to who can appear for a California corporation, and act in its behalf, and whether Title 28 Section 1652 U.S. Code govern the proceedings had in this case.

2. Whether the Trial Examiner, on notice that the only person appearing for the corporation is its individual president, who is not an attorney at law duly licensed in this state may proceed until an attorney is selected to represent the California corporation.

3. Whether the failure to require the corporation to have counsel results in a denial of due process of law guaranteed by the 5th Amendment U.S. Constitution and to void the judgment.

4. Whether the judgment and order against Tred-Air is a nullity and void and in violation of due pro-

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cess of law guaranteed by the Fifth Amendment U.S. Constitution (*Powell v. Alabama* 287 U.S. 45)

5. Whether the judgment against Tred-Air denied the corporation due process and equal protection of the laws and violated Title 28, Section 1652, U.S. Codes.

6. Whether the evidence was insufficient to establish any violation of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

Federal law as well as state law, by court decision, has held that in California (and elsewhere) only an attorney can appear to represent it in legal matters for a corporation. Title 28, Section 1654, does not authorize a corporation to plead and manage its case personally or through an agent who is not an attorney. (*Mullin-Johnson Co. v. Penn Mutual Life Ins. Co.* (D.C. Cal.), 9 F. Supp. 175; *Brandstein v. White Lamps Inc.* (D.C. N.Y.) 40 F. Supp. 369. The National Labor Relations Board is governed by this section. Title 28 Section 1652 provides that the decision of the state shall govern these proceedings.

In *Paradise v. Nowlin* 86 Cal. App. (2) 898 the court held [2] *Appearance—Who May Appear.*— A corporation cannot represent itself in court, either in propria persona or through an officer or agent who is not an attorney; it can be represented in court only by a licensed attorney.

MOTION to dismiss an appeal. Motion granted.

Federated Income Properties, Inc., in pro. per., for Appellant.

Snyder & Fletcher for Respondents.

"A composite of the rule in the decided cases, overwhelmingly sustained by the authorities, may be thus stated: A natural person may represent himself and present his own case to the court although he is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona. (*Bennie v. Triangle Ranch Co., 73 Colo.* 586 [216 P. 718]; *Mortgage Comm. v. Great Neck Imp. Co.,* 162 Misc. 416 [295 N.Y.S. 107, 112]; *Aberdeen Bindery v. Eastern States etc. Co.,* 166 Misc. 904 [3 N.Y.S. 2d 419, 423]; *Finox Realty Corp. v. Lippman,* 163 Misc. 870 [296 N.Y.S. 945, 949]; *J. T. Whalen, Inc. v. Pritzert,* 167 Misc. 471 [3N.Y.S. 2d 418]; *Nispel v. Western Union R. R. Co.,* 64 Ill. 311, 314; *Nixon, Ellison & Co. v. Southwestern Ins. Co.,* 47 Ill. 444, 446; *Kankakee Drainage Dist. v. Commissioners,* 29 Ill. App. 86, 87; *State Bank v. Bell, 5 Blackf.* (Ind.) 127; *Culpeper Natl. Bank v. Tidewater Imp. Co.,* 119 Va. 73 [89 S.E. 118, 120]; *Clark v. Austin,* 340 Mo. 467 [101 S.W. 2d 977, 982]; *New Jersey Photo Eng. Co. v.*

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Carl Schonert & Sons, 95 N.J.Eq. 12 [122 A. 307]; *Black & White Operating Co. v. Grosbart,* 107 N.J.L. 63 [151 A. 630, 633]; *State v. Passaic Co. Agr. Soc.,* 54 N.J.L. 260 [23 A. 680]. See also *Union Pacific Ry. Co. v. Horney,* 5 Kan. 340, 347; *Cary & Co. v. F. E. Satterlee & Co.,* 166 Minn. 507 [208 N.W. 408, 409]; *arguendo, Osborn v. Bank of United States,* 9 Wheat. (22 U.S.) 738, 830 [6 L. Ed. 204, 226].)

"The federal courts have held that the provisions in the statute that 'the parties may plead and manage their own cases' or by attorney ([Rev. Stats. §747], 28 U.S.C.A. §394) (Now 28 U. S. Code 1654) does not authorize a corporation to plead and manage its case personally or through an agent who is not an attorney of the court. (*Mullin Johnson Co. v. Penn. Mut. Life Ins. Co.* (D.C. Cal. 9 Fed.Supp. 175; *Brandstein v. White Lamps, Inc.* (D.C.N.Y.) 20 Fed.Supp. 369.)"

In *Himmel v. City Council* 169 Cal. App. (2) 100 the Court said:

"[1] Primarily the propriety of the court's order striking complaint Number 2 depends upon whether in California a corporation may sue in propria persona. That it may not has been flatly determined in this state. *Paradise v. Nowlin* (1948), 86 Cal.App.2d 897 [195 P.2d 867], so holds (p. 898): "A natural person may represent himself and present his own case to the court although he

is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona [Citations.]"

In 19 C.J.S. Section 1368 the law is stated as follows:

A corporation can appear only by attorney, and an appearance by a duly enrolled attorney is presumably lawful and authorized, the burden resting on the corporation to show that it was unauthorized. A voluntary general appearance by a corporation is a waiver of all defects in the service of process.

A corporation cannot appear in person, but must do so by attorney. Where a duly enrolled attorney of the court appears for the corporation, his appearance is presumably lawful and authorized, and the burden is on the corporation to show that it was unauthorized.[22]

Service. Where a statute provides the mode of service on a corporation by which the court acquires jurisdiction, the method of service prescribed must be followed, unless waived by the corporation, and in the absence of a compliance

[22]N.J.—State v. Passaic County Agricultural Soc., 23 A. 680, 54 N.J.Law 260.

with the statutory requirement a trial cannot legally proceed.[20]

Wherefore Tred-Air of California, Inc., prays that this court reverse the judgment and orders below.

In *Erie R. Co. v. Tompkins,* 304 U.S. 64, the court in overruling *Swift v. Tyson,* 41 U.S. 1 said that *Swift v. Tyson* doctrine was an unconstitutional invasion of rights *reserved to the states.* The court said "Except in matters governed by the Constitution or by acts of Congress, the law to be applied *in any case* is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. (304 U.S. 78)

We submit that Congress in its National Labor Relations Act did not intend to supplant or repeal or limit the law and decisions of the State of California as to who may legally represent a corporation of the state, namely only an attorney at law, duly licensed as such in that state. Federal case law also confirms. (*Mullin Johnson Co. v. Penn Mutual Life Ins. Co.* 9 Fed. Supp. 175, *Brandstein v. White Lamps Inc.* 20 Ed. Supp. 369; 19 C.J.S. Sec. 1368).

The decision of this court holding that Tred-Air Inc. was not duly and legally represented and that the orders of the National Labor Relations Board are

[20]Okl.—Hardeman King Co. v. State, 233 P. 792, 793, 29 Okl. Cr. 14a C.J. p. 880 note 60.

therefore void and of no effect is highly important and the decisions below must be reversed in accordance with the holdings of the laws and court decisions of the State of California.

Respectfully,

MORRIS LAVINE,

Attorney for Tred-Air of California, Inc.

Appendix

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRED-AIR OF CALIFORNIA, INC., Petitioner,	)	
v.	)	No.
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	71-2848

JUDGMENT

Before: HUFSTEDLER, WRIGHT and GOODWIN, Circuit Judges.

THIS CAUSE came on to be heard upon the petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board, dated October 12, 1971, against the Petitioner, Tred-Air of California, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 3, 1972, and has considered the briefs and transcript of record filed in this cause. On June 29, 1970, the Court being fully advised in the premises, handled down its order granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Tred-Air of California, Inc., its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Unlawfully interrogating, threatening or promising benefits to its employees.

2. Unlawfully discharging employees or otherwise unlawfully discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

3. Unlawfully failing or refusing to bargain collectively with Teamsters Automotive Workers Local 495 as the certified representative of its employees.

4. In any other manner interfering with, restraining or coercing its employees in the exercise of any right guaranteed in Section 7 of the Act.

B. Take the following affirmative action:

1. Offer to Thomas E. Lopp immediate and full reinstatement to his former or a substantially equivalent position, and make him whole for any loss of earnings he may have suffered by reason of Petitioner's discrimination against him, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

2. Notify the above-named employee, if presently serving in the Armed Forces of the United States, of

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his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

3. Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Judgment.

4. Upon request, bargain collectively with Teamsters Automotive Workers Local No. 495 as the certified representative of its employees, and embody in a signed contract any understanding reached.

5. Post at its plant in Bellflower, California, copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 21 of the National Labor Relations Board, (Los Angeles, California), after being signed by a representative of the Petitioner, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

6. Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

With costs in this Court in favor of the Board and against respondent. Costs: One-half claimed cost of brief of the Board. $80.00.

Enforced, Judgment Filed and Entered Dec. 6, 1972.
DENNIS R. MATHEWS
/s/ Dennis R. Mathews
Clerk
/A TRUE COPY
ATTEST:
DEC. 11, 1972.
DENNIS R. MATHEWS
Clerk
By R. D. Hewitt,
Deputy

SO ORDERED,
SHIRLEY HUFSTEDLER,
EUGENE A. WRIGHT,
ALFRED T. GOODWIN
Circuit Judges

FILED DEC. 6. 1972
DENNIS R. MATHEWS,
Clerk U.S. Court of Appeals
Docketed

APPENDIX "B"

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

AN AGENCY OF THE UNITED STATES GOVERNMENT.

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection; and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees or otherwise discriminate against them because of their union activities.

WE WILL NOT unlawfully question, threaten or promise benefits to our employees.

WE WILL OFFER to take back Thomas E. Lopp to his old job and pay him for all the wages he lost because of his discharge.

WE WILL, upon request, bargain collectively with Teamsters Automotive Workers Local No. 495 as the certified representative of our employees.

TRED-AIR OF CALIFORNIA, INC.
(Employer)

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1015

TRED-AIR OF CALIFORNIA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The only issue raised by this case is whether the president of a corporation, rather than an attorney, may represent the corporation at a National Labor Relations Board proceeding.

1. The Board found that the Company, which fabricates and recaps aviation tires, violated Section 8(a)(1) of the National Labor Relations Act by unlawfully interrogating employees concerning their union activities, threatening that overtime work would be eliminated and the plant would be closed if the employees voted to unionize, and promising paid vacations and other benefits if they voted against unionization. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging an em-

495-302—73

ployee because of his union activities, and Section 8(a)(5) and (1) by refusing to bargain with the certified representative of its employees. (R. 28–30.)[1] The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order.[2]

2. After service of the complaint, petitioner's president and owner, Odell Lopp, who is not an attorney, wrote the Board's Regional Director, asking for an extension of time for filing his answer and stating, "I have decided, for economic reasons, to handle my own case" (R. 10). At the hearing before the Trial Examiner, Lopp appeared for petitioner. When the Examiner asked if he still wanted to represent the corporation, Lopp explicitly elected to proceed without counsel (R. 26–27; Pet. 5). Following the close of the hearing, petitioner retained counsel who sought a new hearing on the ground that, under California law, only an attorney can represent a corporation and it was unconstitutional to proceed without counsel. Both the Trial Examiner and the Board rejected this contention (R. 27, 44–45), as did the court below (n. 1, *supra*).

3. The court below correctly concluded that there is no substance to petitioner's contention that, since it is

---

[1] "R." references are to Volume I of the formal record used in the court below, which has been lodged with this Court. The Board's decision, which is not included in the appendix to the petition, is at R. 25–32, 44–45.

[2] The court's opinion, which was not reproduced in the petition, states:

"The Board's order will be enforced. There is ample evidence in the record to support it. In our view, Tred-Air's constitutional arguments are frivolous."

The court's judgment is reproduced at Pet. App. A, pp. 1–4.

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a corporation, it could only be represented before the Board by an attorney. Whatever may be the rule as to state and federal *judicial* proceedings (Pet. 9–13),[3] participation in a Board proceeding is governed by the provisions of the National Labor Relations Act, which treat a corporation the same as any other person, and do not require appearance through an attorney. Section 10(b) of the Act, 29 U.S.C. 160(b), provides that, when a complaint issues and is served upon a "person"[4] in an unfair labor practice proceeding, such person shall have the right to appear in person "or otherwise." Similarly, Section 102.38 of the Board's Rules and Regulations, 29 C.F.R. 102.38, specifies that any party to an unfair labor practice proceeding may appear "in person, by counsel, or by other representative." Contrary to petitioner's contention (Pet. 13–14), these provisions, rather than California law, govern Board proceedings. See *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 123; *Hill* v. *Florida*, 325 U.S. 538, 542.[5]

[3] 28 U.S.C. 1654 provides that "In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[4] Section 2(1) of the Act, 29 U.S.C. 152(1), defines "person" to include "corporations."

[5] By its terms, 28 U.S.C. 1652, which provides that the "laws of the several states * * * shall be regarded as rules of decision in civil actions in the courts of the United States," is not applicable where "Acts of Congress otherwise require or provide."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1973.

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PETITIONER'S REPLY BRIEF

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 9-1722

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1015

TRED-AIR OF CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Tred-Air of California, a California corporation, respectfully replies to the memorandum of the National Labor Relations Board in reply to our petition for writ of certiorari.

The respondent has misconceived our point and erroneously twisted their argument and did not reply to our points and issues.

Our point is that a corporation, whether state or federal, is a separate entity from an individual and whether it is a California corporation or any other corporation, it can only appear as a representative by an attorney at law duly licensed to practice as a lawyer.

California follows this point of law and California requires an attorney to appear and represent it, since a corporation is a distinct legal entity, separate and apart from its members or stockholders and from its directors or officers. (*Curtiss v. Murry,* 26 Cal. 633; *Miners' Ditch Co. v. Zellerbach,* 37 Cal. 543; *Copsey v. Sacramento Bank,* 133 Cal. 659, 66 P. 7, 204; *Erkenbrecher v. Grant,* 187 Cal. 7, 200 P. 641; *Miller v. McColgan,* 17 Cal. 2d 432, 110 P. 2d 419, 134 ALR 1424)

Thus a stockholder is not in legal contemplation the employer of those working for the corporation. (*Parkinson (J.F.) Co. v. Building Trades Council,* 154 Cal. 581) Nor is he the owner of the corporate property. (*Johnson v. Kirby,* 55 Cal. 482; *Miller v. McColgan,* 17 Cal. 2d 432, 134 ALR 1424)

A corporation is an artificial person. (*Dearborn v. Grand Lodge,* 138 Cal. 658)

A corporation may invoke the equal protection clause of the Fourteenth Amendment against any proscribed action by a state. (*Johnson v. Goodyear Mining Co.,* 127 Cal. 4)

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Under federal law, as well as state law, only an attorney can appear for it and plead and manage its case. (*Mullin Johnson Co. v. Penn Mutual Life Ins. Co.*, 9 F. Supp. 975; *Brandstein v White Lamps, Inc.*, 20 F. Supp. 369)

The attorney for the National Labor Relations Board, in his reply, made it appear or attempted to make it appear that the issue was only whether the law of California regarding representation in California by an attorney for a corporation was necessary.

Our point was and is that whether the corporation is a California corporation or a corporation in any other state, that the person who appears for it in a representative capacity must be an attorney at law since it is not the person of the president or his statements that are involved, but is the actual action of the corporation that is liable and is subject to penalty and not the individual president. **Congress surely intended corporations to be adequately represented before the National Labor Relations Board.**

Neither *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 123, nor *Hill v. Florida*, 325 U.S. 538, 542, are in point in answer to our argument.

In *Hill v. Florida*, 325 U.S. 538, the only question involved was whether a Florida statute regulating labor union activities had been applied to the petitioners in that case in a manner which brings it into ir-

reconcilable conflict with the collective bargaining regulations of the National Labor Relations Act. No issue was involved in that case as to whether a corporation, whether state or federal, had to be represented by an attorney and whether merely as an officer of the corporation, without any resolution or other authority from the corporation, the president of the corporation could appear and represent. The questions in *Hill v. Florida* are quite different.

Congress, by the enactment of the National Labor Relations Act, did not intend to preclude the states from exercising to the utmost extent their sovereign powers to enforce the requirement that corporations, whether in California or elsewhere, can only be represented by an attorney at law and the right and obligations of the corporation and its stockholders to be represented only by a qualified person with knowledge of its legal rights and duties.

National Labor Relations Board v. Hearst Publications, Inc., 325 U.S. 538, involved the issue of whether newsboys who distributed their papers had rights and were able to bargain with four newspapers. The newspapers contended that they were not required to bargain with the newsboys' Union because newsboys are not the employees of newspapers within the meaning of the term in the National Labor Relations Act, 29 USCA, Section 152. Again, there was no issue of requiring an attorney to represent them. There was

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nothing in the case that held that the National Labor Relations Board could dispense with corporations generally, and an attorney to represent them. There was nothing in the statute specifically requiring that the corporations and their stockholders be represented before the National Labor Relations Board by an attorney at law well qualified to give it the kind of representation that due process requires and to give it the effective aid of counsel, whether it is a California corporation or a corporation elsewhere.

Due process of law requires adequate representation by counsel. See: *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158.

WHEREFORE, Tred-Air of California, Inc. prays that this Court grant certiorari and accord to Tred-Air the right to have effective aid of counsel in it and to reverse the judgment and orders below.

Respectfully,

MORRIS LAVINE,

Attorney for Petitioner.

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PETITION FOR REHEARING

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TO THE HONORABLE THE CHIEF JUSTICE, WARREN E. BURGER, AND TO THE HONORABLE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully petitions for rehearing on the ground that Tred-Air of California, Inc., a California corporation, has been and is being denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

By the decision of the Court below and that of the Hearing Examiner, the corporation is being charged with and assessed the wages of an employee without its day in Court because only an attorney at law can legally represent

a corporation and only after he is duly authorized by the corporation by its Board of Directors to represent it. A corporation cannot appear before a Court and should not be permitted to appear before a Labor Board in matters in which the corporation is involved or is being assessed a penalty without having counsel to represent it.

In Osborn, et al. v. The Bank of the United States, 6 L.ed. 226, the Court says:

> "It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it.
>
> * * *
>
> "Natural persons may appear in court, either by themselves or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other."

See also: Mullin-Johnson Co. v. Penn Mutual Life Ins. Co., 9 F.Supp. 175; Brandstein v. White Lamps, Inc. 20 F.Supp. 369; Paradise v. Nowlin, 86 Cal.App.2d 898

By denying a hearing, the Court is denying petitioner due process of law and the equal protection of the laws for in all other cases, in state or federal Courts, an attorney is required to represent the corporation.

A corporation is an artificial person. (Dearborn v. Grand Lodge, 138 Cal. 658)

A corporation may invoke the equal protection clause of the Fourteenth Amendment against any proscribed action by a state. (Johnson v. Goodyear Mining Co., 127 Cal. 4)

Under federal law, as well as state law, only an attorney can appear for it and plead and manage its case. (Mullin-Johnson Co. v. Penn Mutual Life Ins. Co., 9 F.Supp. 175; Brandstein v. White Lamps, Inc., 20 F.Supp. 369)

It would be grossly unfair to let the judgment of the Court of Appeals stand and to leave the corporation itself unrepresented because an officer of the corporation claimed to be able to represent it and thus place the liability on the corporate members who did not have their day in Court and who deprived the stockholders of their day in Court.

We respectfully pray for rehearing and reversal of the Judgments below.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

CERTIFICATE OF COUNSEL

Counsel certifies that the foregoing petition is filed in good faith and not for the purpose of delay and that it raises substantial questions of law which have been overlooked by the Court in its consideration of the case and which involves equal protection of the laws and due process of law to a corporation as well as an individual under the Fifth Amendment to the Constitution of the United States.

Morris Lavine

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

Ethel Vornholt, being first duly sworn, deposes and says: that I am and was at all times herein mentioned, a citizen of the United States and a resident of the County aforesaid, over the age of eighteen years and not a party to the within above entitled action; that my business address is 215 W. 7th St., Los Angeles, Calif. That on April 18, 1973 I served the within Petition for Rehearing on the Respondent in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, Calif. addressed as follows:

National Labor Relations Board, Local 21 (Branch Office), 849 S. Broadway, Los Angeles, Ca. 90014

Marcel-Mallet-Prevost, Esq., National Labor Relations Board, Washington, D.C.

William J. McCauley, Esq., for the General Counsel, National Labor Relations Board, Washington, D.C. 20570

Paul Crost, Esq., Brundage, Neyhart, Miller, Ross & Reich, 1625 W. Olympic Blvd., Suite 805, Los Angeles, Ca. 90015

Carl H. Ullman, 1616 West 9th Street, Los Angeles, Ca. 90015

Ethel Vornholt

Subscribed and sworn to before me this 18th day of April, 1973.

Jacquelyn Brucker

Notary Public in and for Said County and State

OFFICIAL SEAL
JACQUELYN BRUCKER
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 14, 1976
(SEAL)